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No. 85-1627

In the Supreme Court of the United States

October Term, 1985

FRED MAYER, Property Owner,
Summit County, Ohio,
Petitioner,

vs.

EDWARD DAVIS, CITY OF AKRON, OHIO
and PATRICIA C. AMBROSE,
Agent for Annexation Petitioners,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONER

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Respondents, EDWARD DAVIS, CLERK OF THE AKRON CITY COUNCIL, and PATRICIA C. AMBROSE, AGENT FOR ANNEXATION PETITIONERS, have in their opposing brief in No. 85-1627, ignored the Petitioner's request for alternative relief. That request in essence, was that this Court grant review, summarily vacate the judgment below, and remand the matter to the Ohio Supreme Court to consider the probable adequate state grounds based on the merger of Petitioner's property with the City of Cuyahoga Falls. That merger occurred sub-

sequent to the Ohio Supreme Court's decision below, and had it occurred prior to the time the Ohio Supreme Court decided this matter, would have resulted in a contrary result based on State Law.

In essence, the Petitioner argues that once the merger occurred, the Akron City Council has absolutely no authority to accept or reject the annexation, and that this acts as an absolute bar to the completion of the Mayer annexation.

Thus, Petitioner asks this Court to reverse and remand in order to give the Ohio Supreme Court the opportunity to consider the effect of merger. Further, Petitioner believes that the Ohio Supreme Court could reasonably be expected to declare that the fact of merger extinguished the annexation proceedings in this case. In doing so, the result would be opposite that reached by the Ohio Supreme Court in this matter, and would obviate the necessity for this Petition for Writ of Certiorari to be considered by the United States Supreme Court.

The fact that the Respondents did ignore this alternative request for relief is perhaps understandable. That is, Petitioner's argument for alternative relief on pages 21-25 of its Petition for Writ of Certiorari, was based essentially on the analogous case of *Board of County Commissioners v. Elyria* (1962), 174 Ohio St. 135. Because the merger involving Petitioner's property, was the first merger ever to occur in the State of Ohio pursuant to O.R.C. 709.45 et seq., no prior case law had existed on this matter in the State of Ohio.

On April 9, 1986, the Common Pleas Court of Summit County, Ohio decided a case exactly on point and in part encompassing the property of Petitioner, Fred Mayer.

In this decision, the Ohio Court found that indeed the merger of Northampton Township to the City of Cuyahoga Falls, extinguished the pending annexation petition. This is further proof that the Ohio Courts, if given the opportunity, would rule in the manner that Petitioner suggested in his request for alternative relief to this Court.

Interestingly, Respondent, Patricia C. Ambrose, was attorney of record in the case of *Edward Davis, Clerk of Akron City Council v. Northampton Township Trustees, Northampton Township, et al.*, Case 85-124073, unreported, a copy of which is reproduced for the Court's review in the appendix.

The remainder of Respondent's brief in opposition essentially makes those arguments one would expect from a Respondent's brief in a Petition for Writ of Certiorari case. Therefore, no additional comment is made as to those arguments.

For the reasons set forth above, the Petitioner respectfully requests this Court to grant its Petition for Certiorari, or in the alternative, to grant review, summarily vacate the judgment below and simultaneously remand the case to the State Court below to consider Federal and State grounds for review, as had been requested in Petitioner's original Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, IN EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL v. NORTHAMPTON TOWNSHIP TRUSTEES, NORTHAMPTON TOWNSHIP, ET AL.

(Filed April 9, 1986)

Case No. CV 85 12 4073

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

EDWARD DAVIS, CLERK OF AKRON CITY COUNCIL, *et al.*,
Plaintiffs,

vs.

NORTHAMPTON TOWNSHIP TRUSTEES, NORTHAMPTON TOWNSHIP, *et al.*
Defendants.

JUDGMENT ENTRY

This matter is before this Court in consideration of Plaintiffs, Edward Davis, et al.'s Brief in Support of Declaratory Judgment, filed February 3, 1986, and Defendant, City of Cuyahoga Falls, et al.'s Brief in Opposition, filed February 24, 1986.

Upon consideration of the pleadings submitted, the Court makes the following findings:

The Court finds that the parties have stipulated to the following facts:

1. On June 3, 1983, two of the three owners of 141.8 acres of land in Northampton Township filed a petition for annexation to the City of Akron with Summit County Council.

2. This property was composed of three tracts of land owned one each by the City of Akron, Welcome Radio Association and Ernest Sommers.

3. The City of Akron and Welcome Radio Association signed the petition for annexation as owners of 90 of the 141.8 acres.

4. A public hearing was held before Summit County Council on August 15, 1983 to hear the merits of granting the annexation. Ernest Sommers, owner of 51.8 acres in the annexation territory testified in opposition to the annexation.

5. On February 6, 1984, Summit County Council in Resolution 84-79 denied the petition on the grounds that the majority of the landowners had not signed the petition, and that the general good of the territory would not be served.

6. On February 15, 1984, the Petitioners, through their agent, appealed these findings to the Summit County Court of Common Pleas (Case No. CV 84-2-0474).

7. On February 11, 1985, the Court of Common Pleas reversed the determination of Summit County Council on the basis that County Council's decision was illegal, arbitrary and not supported by the preponderance of the evidence.

8. On February 26, 1985, the Court of Common Pleas issued supplemental findings that the general good of the territory would be served by annexation and ordered that the annexation petition be granted.

9. Appeal was taken to the Ninth District Court of Appeals on February 27, 1985.

10. From March 1, 1985 to October 30, 1985, the City of Akron Clerk and Council were stayed from acting on the annexation and accepting the annexation territory.

11. On October 30, 1985, the Ninth District Court of Appeals reversed the Common Pleas Court ruling. Currently, the Ohio Supreme Court is considering Petitioners' Memorandum in Support of Jurisdiction, attempting to reverse the Ninth District's decision.

12. On February 9, 1984, the owners of 1.033 acres of land known as 1862 Akron-Peninsula Road in Northampton Township filed a petition for annexation to the City of Akron with Summit County Council.

13. On February 9, 1984, Fred Mayer and David Meeker owned this property as equal partners.

14. Before February 9, 1984 both Fred Mayer and David Meeker signed the petition for annexation.

15. A public hearing was held before Summit County Council on June 4, 1984.

16. On December 17, 1984, Summit County Council in Resolution 84-726 approved the annexation petition.

17. Subsequent to Summit County Council's approval of the petition for annexation, Fred Mayer became the sole owner of the property and sought to enjoin the annexation, which injunction was granted on March 8, 1985, by the Summit County Common Pleas Court.

18. From this, Akron appealed and on August 25, 1985, the Ninth District Court of Appeals ruled that the annexation could proceed. The Ohio Supreme Court on December 4, 1985 dismissed Fred Mayer's attempted appeal from that ruling. Currently, the matter is stayed pending a request for appeal to the U.S. Supreme Court.

19. On February 13, 1984, the petition for the election of a merger commission for the merger of Cuyahoga Falls, a municipality, and of Northampton Township, the unincorporated territory of a township, was filed with the Summit County Board of Elections, pursuant to O.R.C. Section 709.45.

20. The petition for annexation of 141.8 acres to the City of Akron (para. 1) had been filed with Summit County Council before the petition for the election of a merger commission for the merger of Cuyahoga Falls and Northampton Township was filed with the Summit County Board of Elections.

21. The petition for annexation of 1.033 acres of the City of Akron (see para. 12) had been filed with Summit County Council before the petition for the election of a Northampton/Cuyahoga Falls Merger Commission was filed with the Summit County Board of Elections.

22. On November 6, 1984, the Cuyahoga Falls/Northampton Merger Commission was elected.

23. On July 24, 1985, the Merger Commission agreed to conditions of merger.

24. On November 5, 1985, the voters of Northampton Township and Cuyahoga Falls elected to merge pursuant to the conditions agreed to by the Merger Commission.

25. On January 1, 1986, the Northampton/Cuyahoga Falls merger took effect under O.R.C. Section 709.47.

CONCLUSIONS OF LAW

Ohio Revised Code Section 709.48 states in pertinent part:

> On and after the date on which a petition is filed with the board of elections under section 709.45 of the Revised Code for the election of a merger commission for the merger of a municipal corporation and the unincorporated territory of a township, no petition for the annexation of any part of the unincorporated territory of the township shall be filed with a board of county commissioners under section 709.03 or 709.15 of the Revised Code, until one of the following occurs: . . .

The statute does not address the status or manner to proceed with petitions for annexation filed prior to the petition for merger.

In *Board of County Commissioners v. Elyria* (1962), 174 Ohio St. 135, the Court stated:

> The jurisdiction which attached when the proceeding was instituted was valid jurisdiction to conduct an annexation proceeding involving annexation of part of a village to a city. The subject matter over which the board had jurisdiction as to annexation related only to annexation of part of a village to a city and not as to part of a city to another city. When North Ridgeville changed its status, the subject matter of the annexation was changed also, and because of the statutory differences in the annexation proceedings the change of status of North Ridgeville from a village to a city divested the board of its jurisdiction over the subject matter, and any further action taken by the board would have been a nullity. *Id.*

> Although a change of conditions during the pendency of an annexation proceeding before a Board of County Commissioners which does not affect the subject matter of the proceeding may not divest the board of its jurisdiction, a change of conditions which does affect the subject matter so that the statutory basis of jurisdiction no longer exists divests the board of its jurisdiction.

Id. at 139.

The Court finds the reasoning in *Elyria* to be applicable to the case *sub judice*. As a result of the merger, Summit County Council and Akron City Council have been divested of any authority to perform the required acts to conclude the annexations.

The pending annexation petitions are extinguished as a result of the merger of Northampton and Cuyahoga Falls.

Judgment for Defendants.

It is so ordered.

There is no just cause for delay.

MARY F. SPICER
Judge